Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MELVIN MORTON GREEN,

Petitioner,

v.

CAL TERHUNE, Director, Department of Corrections,

Respondent,

and

ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Additional Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should a certificate of appealability be denied where a petitioner for habeas corpus has presented the District Court and Circuit Court with *prima facie* showings that the petitioner was convicted (1) despite the absence of evidence which "could reasonably support a finding of guilt beyond a reasonable doubt, and (2) as a result of ineffective assistance of trial counsel?

2. Should judges of the Circuit Court make it a practice to decide whether to issue certificates of appealability without giving Petitioners an opportunity to file requests presenting the case for their issuance?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Melvin M. Green respectfully prays that a writ of certiorari issue to review the decision of the Ninth Circuit Court of Appeals denying a certificate of appealability herein.

ORDERS BELOW

The November 27, 1998 Ninth Circuit Court of Appeals' order denying a certificate of appealability is attached hereto as Appendix A. The August 31, 1998, Judgment and Order Adopting Report and Recommendation of United States Magistrate Judge are attached hereto as Appendix B. The October 2, 1998 District Court order denying Petitioner's request for a certificate of appealability is attached hereto as Appendix C. The February 16, 1999 order denying Petitioner's motions for rehearing, rehearing in banc, and reconsideration is attached hereto as Appendix D.

JURISDICTION

On September 29, 1998, judgment denying Petitioner's petition for writ of habeas corpus was entered in the United States District Court for the Central District of California. The District Court denied Petitioner's request for a certificate of appealability on October 2, 1998. On November 27, 1998, the Ninth Circuit Court of Appeals also denied a certificate of appealability. On February 16, 1999 the Ninth Circuit Court of Appeals entered its order

denying Petitioner's motions for rehearing, rehearing in banc, and reconsideration. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). *Hohn v. United States*, 118 S.Ct. 1969, 1978 (1998).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment Five

No person shall . . . be deprived of life, liberty or property, without due process of law.

United States Constitution, Amendment Fourteen

No State shall . . . deprive any person of life, liberty or property, without due process of law.

Federal Rules of Appellate Procedure 22(b)

(1) In a habeas corpus proceeding in which the detention complained of arises from process issued by a state court, or in a 28 U.S.C. § 2255 proceeding, the applicant cannot take an appeal unless a circuit justice or a circuit or district judge issues a certificate of appealability under 28 U.S.C. § 2253(c) . . . If the district judge has denied the certificate, the applicant may request a circuit judge to issue the certificate.

(2) A request addressed to the court of appeals may be considered by a circuit judge or judges, as the court prescribes. If no express request for a certificate is filed,

the notice of appeal constitutes a request addressed to the judges of the court of appeals.

STATEMENT OF THE CASE

A. Procedural History

On May 24, 1991, Petitioner was arraigned in Los Angeles Superior Court on an information charging him with murder in violation of Penal Code § 187(a), with special allegations that the murder was carried out for financial gain within the meaning of Penal Code § 190.2(a)(1), and that a principal was armed with a firearm within the meaning of section 12022(a)(1) (CT 172-73). Petitioner pled not guilty and denied the special allegations (CT 174).

On March 4, 1992, having deliberated since February 25, 1992, and having declared itself deadlocked at one point (CT 244), the jury returned its verdict, finding Petitioner guilty and finding the special allegations to be true (CT 330). On May 27, 1992, the trial court denied Petitioner's motion for a new trial and sentenced him to life without possibility of parole (CT 104).

The judgment was appealed to the Court of Appeal for the Second Appellate District and in an opinion filed on December 14, 1993, affirmed by Division One of that Court. The Supreme Court denied review on March 17, 1994.

Petitioner filed his Petition for Habeas Corpus in the Los Angeles Superior Court on April 22, 1997. The petition was denied by order of that court dated June 25,

1997. Upon notification of the denial, Petitioner immediately filed his Petition for Habeas Corpus in the Court of Appeal for California's Second Appellate District. That court denied the Petition on July 23, 1997. Thereafter, Petitioner petitioned the California Supreme Court for review of that denial. The California Supreme Court denied review in an order dated September 17, 1997, which Petitioner's counsel received by mail on September 20, 1997.

Petitioner then filed his Petition for Habeas Corpus under 28 U.S.C. § 2254 in the District Court for the Central District of California on September 22, 1997. On September 29, 1998, judgment denying the petition was entered. On September 29, 1998, Petitioner filed his notice of appeal and request for certificate of appealability in the District Court. The District Court denied Petitioner's request for a certificate of appealability on October 2, 1998. On November 27, 1998, the Ninth Circuit Court of Appeals denied the certificate of appealability. On February 16, 1999, the Ninth Circuit Court of Appeals entered its order denying Petitioner's motions for rehearing, rehearing in banc, and reconsideration.

B. Relevant Facts

1. Evidence Introduced at Trial

a. The Murder.

At about 10:20 a.m. on the morning of October 25, 1990, Nicholas George Foss heard a gunshot (RT 725-26), and saw a man standing inside the driver's side door of a

red Corvette in the entrance to the parking lot of Petitioner's place of business (RT 727, 729). The man ran to a motorcycle and rode off. (RT 726, 731-32, 741-42). Foss ran to the car and saw a woman, Anita Green, slumped over and bleeding in the driver's seat (RT 733-34).

Lily Lopez, Petitioner's receptionist, was talking to Petitioner in the reception area of Petitioner's office at around 10:30 a.m. that morning when a woman rushed in and told them what happened. Petitioner hurried out to the car (RT 1312-16), shouted "Call 911" (RT 1318), and hugged and talked to Anita until the paramedics arrived. He said, "Oh, my God, Oh, my God. It's my wife" (RT 744-45). He appeared to be shocked, and was crying (RT 735, 746).

The police arrived within two to three minutes (RT 736). On October 27, 1990, at 3:55 p.m., Anita Green was pronounced dead of a gunshot wound to the head (RT 695).

b. Anita Green's Actions Before Her Death.

Anita Green, who married Petitioner in 1981 (RT 777), moved out in July 1990 (RT 793-94). Petitioner gave her $20,000 that month (RT 875), another $3,300 in August, and $500 in September (RT 927). He also gave her son $23,000 after they separated (RT 792-94), and gave her a check for $252.65 on October 15, 1990 (RT 1265). Anita's mother loaned Anita $25,000 shortly before she was shot (RT 1273-74).

Anita's hairdresser, Eugenia Siguenza, said that Anita Green got a call from Petitioner in her shop on

October 24, during which Siguenza heard her say she could not go to Petitioner's office the next morning (RT 1280). After the telephone conversation, Anita said that she was afraid to go to Petitioner's office at 10:30 the next morning (RT 1281), but that Petitioner insisted she come for a check (RT 1282). She heard similar conversations on October 3 and 10 (RT 1277-80). Petitioner's office calendar showed that he had an appointment with Anita on October 25, 1990 at 10:30 a.m. (RT 968).

Steven Jacobs, the rabbi of the congregation of which Anita was president (RT 1298-99), had an intimate relationship with Anita at the time of her death (RT 1303), and she spent the night of October 24, 1990 at his house (RT 1293). Jacobs said Anita left the morning of October 25 before he got up (RT 1293). Jacobs told the police that she had said she was going to Petitioner's office the next morning to do some work (RT 1297). In his trial testimony, however, Jacobs changed his story, first saying that she was going to pick something up which he thought related to work (RT 1304), then that she *may* have been picking up a check (RT 1305), then that she *did* go to get a check (RT 1310).

c. The Aftermath of the Murder and the Investigation.

Detective John Michael Coffey arrived at the scene of the shooting at about 10:30 a.m. (RT 648-49). He testified that he asked Petitioner what was going on, and Petitioner told him to "ask guys she was screwing (RT 665)." Coffey admitted that was not in his notes (RT 667).

Petitioner went to talk to Foss on October 26, the day after the shooting, and Foss told him that all he saw was the motorcycle (RT 736). Foss testified that he did not tell Petitioner which direction Anita was coming from (RT 737, 749).

Joseph Corrado, a client, was staying at Petitioner's house at the time of the shooting (RT 1341).[1] In his statement to the police, Corrado said that they discussed the shooting on October 29, 1990. Petitioner said that Anita probably cut someone off on the freeway, headed west on Oxnard and turned right onto Wilkinson. Corrado said he thought she would have made a left turn onto Wilkinson. They argued (RT 1322) and Petitioner said Foss told him Anita turned right (RT 1323).

In his testimony, Corrado changed his story and said that the argument he had described took place, not on October 29, but on October 25. He said that Petitioner came in earlier than usual, and when Corrado asked him why, he said that Anita had been shot (RT 1334), and the argument ensued (RT 1335).

Corrado said he then went out of town, and returned on October 29, at which time they had another talk about the shooting (RT 1337). He admitted that there was nothing in his statement to the police about the conversation on October 25 (RT 1340), but said that was because he had

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[1] Corrado said that he had assumed Appellant had asked him to live with him rent-free because he was a client but that he got a bill for rent from Appellant about 30 days after he moved in (RT 1343).

put the two conversations together in his mind when he was questioned (RT 1352).

Hernandez interviewed Corrado once in person on October 31, 1990 (RT 1483), and talked on the telephone three or more times after that. Corrado told him in a call that he had two conversations with Petitioner, but he never corrected it in his report (RT 1487-92), or told the district attorney about it (RT 1507).

Gilbert Mershon, who rented space in Petitioner's office building and subcontracted work from him (RT 1006) said a friend called him and told him that Anita had been shot. He was interviewed five days after the shooting (RT 1015, 1021). He also wrote Hernandez a letter the next day (RT 1022).

Mershon told Hernandez that Petitioner had said a number of times that he would have Anita killed if she tried to get more than he was willing to give (RT 1010-11, 1077). Mershon also told him that he believed Petitioner could have had Anita killed through his "mind control" over "lowlifes" he knew, and suggested six people, including the retarded son of a woman who worked for Petitioner (RT 1025, 1029, 1081-82).[2]

Mershon said for the first time in his follow-up letter to Hernandez that Petitioner told him once that Anita would get out of her car someday, and somebody would

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[2] Mershon said that, during his own divorce, he had sent his ex-wife flowers on which he had urinated (RT 1049).

walk over and blow her brains out (RT 1012, 1020).[3] In his testimony, Mershon added a further detail (RT 1054): that Petitioner suggested to him that he could go out to the desert and hire a biker to do it (RT 1012).

On November 12, 1990, Hernandez led a lengthy search of Petitioner's office pursuant to a search warrant (RT 672, 1372), which resulted in the seizure of hundreds of documents (RT 1373-77). Neither then nor at any time did the police find any evidence that Petitioner had contact with the man who shot Anita Green.

d. Testimony With Regard to the Relationship Between Petitioner and Anita.

Bernyce Green was married to Petitioner from about 1962 until their separation in 1975-76 and divorce three years later (RT 1470). They reached a settlement over the division of property, and remained friendly after the divorce (RT 1471).

According to Scott Arnow, Anita's son by a previous marriage (who admitted that he hated Petitioner, RT 810), Petitioner and Anita had a tranquil relationship for about five years after they moved in together (RT 777). After that, they had arguments two or three times a week (RT 780), but he never saw Petitioner strike his mother (RT 798).

Barbara Wolpow worked for Petitioner between 1974 and 1981. She introduced Anita to Petitioner, and Anita

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[3] Mershon's mother said Mershon told her about this remark in April or May 1990 (RT 1104).

began to work for Petitioner, too (RT 822). She said that Petitioner would shout at employees, including Anita (RT 823-24, 837). Mershon agreed that Petitioner was verbally abusive to Anita (RT 1007-09), and Lily Lopez said that (RT 965-66) they argued daily (RT 966).

Starting in August of 1990, Anita came into the office about once a week to pick up work to do at home. At times she would work in the office for periods ranging from a few minutes to a few hours (RT 970, 982-83).

Lopez said that after Anita stopped working full time, Petitioner started expressing his feelings about the divorce in the office, accusing Anita of infidelity and of not working enough (RT 970), and expressing great bitterness against Rabbi Jacobs (RT 974-75). He said that he did not intend to give Anita "a farthing" more than she was entitled to (RT 971), and that Anita was trying to destroy his business by denouncing him to the I.R.S. He also said he had seen Anita's car at the I.R.S. (RT 972-75). Janet Frangie, an attorney acquainted with the Greens, said that Anita told her in the summer of 1990 that she could give the I.R.S. information that would hurt Petitioner's business (RT 986-88). Robert Keith, a client of Petitioner, said the same (RT 995).

Angela Ramos, the housekeeper in the Green home between 1982 and 1987, heard arguments several times (RT 1113). She heard Petitioner say Anita could leave him, but would have no money (RT 114). Shown a statement taken by the police, she recalled that around August, 1987, Petitioner said that if Anita left, she would not live to spend his money (RT 1117-19).

Berta Solis was the Greens' housekeeper from 1988 until Anita moved out, and then Anita's until her death (RT 998). While working at the Green house, she heard arguments, but never heard Petitioner make any threats (RT 999-1000). He did, however say that she was going to be the "ex-Mrs. Green" (RT 1000).

Phyllis Baltin (a friend of Anita) and Bill Schiffbauer (the man she was dating) testified that Petitioner called on July 12, 1990 (RT 1205-07) and asked Schiffbauer how much he would charge to "knock off" Petitioner's wife. Schiffbauer, with a chuckle, said $5,000,000. Petitioner said he could not afford that, but suggested that they should "take care of" each other's wives (RT 1209, 1222-23). The couple did not know if Petitioner was serious (RT 1216, 1228-29).

e. The Divorce Negotiations.

Janis McDonald, Anita's divorce lawyer (RT 857-58), said that Anita was seeking $800,000. She said she intended to contest contracts the couple had signed limiting Anita's recovery to about $200,000 (RT 861-62).

McDonald believed that Petitioner's total assets were over $2,000,000. Her first offer was to settle all claims for $500,000 in addition to that due under prior agreements (RT 939, 941-44, 1548-49).

There was a meeting on September 6, 1990, attended by Petitioner, Anita, and their attorneys. Petitioner was actively involved in the discussion. He was angry, (RT 874-75), but willing to pay her to work pending the divorce (RT 875). Stanton suggested that Anita work at

the office (RT 876), but Anita refused, saying Petitioner had waved guns at her and hit her on occasion (RT 878-89). Rather than have Petitioner respond (RT 879), Stanton responded with another offer,[4] proposing that Anita take work home, to which both sides agreed (RT 879-80, 1538).

There was also discussion of Petitioner's obligations to the congregation (RT 935-37, 1550, 1551-52): a binding $72,000 guarantee of a loan to build a new temple, and a $300,000 non-binding pledge, both of which were payable if the congregation defaulted on its construction loan (RT 1439-40). Petitioner wanted access to the building committee to work out the issue (RT 1541-42).[5] At the conclusion of the meeting, McDonald reduced her request for an additional payment from $500,000 to $300,000 (RT 862-63). Only once after the meeting did Anita call McDonald to complain about an incident at Petitioner's office (RT 957-59).

f. The I.R.S. Investigation.

The only problem Petitioner had with the I.R.S. during this period related to the audit of one of Petitioner's clients, Dr. Castner, by an I.R.S. agent, Amanda Truett (RT 1148-49).

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[4] McDonald agreed that family law attorneys generally instruct their clients that meetings of this type are not for the purpose of deciding who is right and who is wrong, but to resolve the outstanding problems (RT 932-33).

[5] The loan was still outstanding when Anita was killed (RT 1430), and nothing had changed since her death (RT 1440).

While Truett testified that Petitioner expressed great concern about the potential impact of the audit on his license (RT 1157-58, 1165-66), Petitioner knew by early September 1990 that the matter could be settled for a single fine of $500 (RT 1180-81).

Truett testified that in their last telephone conversation, around September 12 or 13, 1990, Petitioner spoke about his divorce, saying that Anita was asking for too much money (RT 1167), was trying to take over his business and removing documents from his files, and was unfaithful. Petitioner said he was so angry he could kill Anita (RT 1169, 1174).

g. Petitioner's Writings Introduced into Evidence Against Him.

A great deal of material (41 documents in all) Petitioner had written over his nearly fourteen-year long relationship with Anita was introduced into evidence (Exhibit 7), including a poem dated June 11, 1979 (Exh. "B") and various letters and memos setting out complaints about Anita's conduct.

2. Evidence of Ineffective Assistance of Counsel

The only prosecution evidence which might support an inference of Petitioner's involvement in the murder was the testimony showing that Petitioner insisted that Anita come to his office at 10:30 a.m. on October 25 just to pick up a check (RT 1277-80). The prosecution sought to infer that Petitioner's otherwise inexplicable insistence showed that he must have planned Anita's murder for

that time and place. Thus, the prosecutor argued at trial that Anita was waiting for the check, and "the defendant refuses to mail her a check. . . . What's so urgent in the defendant's mind (RT 1680)?" The Court of Appeal opinion stated that "coerced into going to the fatal meeting by [Petitioner's] refusal to send her a check (Opinion, p. 17)." The defense put on no evidence to the contrary, failing even to argue on the basis of Rabbi Jacobs' original statement (RT 1297), that Anita was going to the office to do some work.

The evidence supporting this Petition demonstrates, however, that the defense in fact had substantial evidence available to it which *would* have shown that Anita was coming to the office to work on an urgent basis, because she was preparing quarterly returns which were due on October 31, 1997.

Thus, as Irene Sherwyn and Lily Lopez now testify, and would have testified at trial, Anita was coming to Petitioner's office that day to work on clients' third quarter payroll tax returns, which were due on October 31, 1990 (Declarations of Irene Sherwyn and Lily Lopez). Their testimony is corroborated by a timesheet from the file of one of Petitioner's clients, Dr. Robert Herring, which includes Anita's own notations showing that she had worked on Dr. Herring's third quarter reports on August 6, 1990, and on October 17 and 18, 1990 (Exhibit A to Declaration of Cynthia Erdelyi; Declaration of Melvin Morton Green).

REASONS FOR GRANTING THE WRIT

The Petition Raises Important Questions as to the Issuance of Certificates of Appealability.

Section 2253, as amended by the AEDPA, states that a certificate of appealability should issue where the petitioner/appellant has made "a substantial showing of the denial of a constitutional right."

This Court has not yet construed the standard as amended, but it appears to incorporate the standard this court previously adopted for certificates of probable cause in *Barefoot v. Estelle*, 463 U.S. 880 at 893 (1983), quoting, *Stewart v. Beto*, 454 F.2d 268 at 270, footnote 2, which required a "substantial showing of the denial of [a] federal right." The Court there elaborated that the applicant

> "need not show that he should prevail on the merits. . . . Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court *could* resolve the issues in a different manner; or that the questions are "adequate to deserve encouragement to proceed further."
>
> 463 U.S. at 893, footnote 4, quoting *Gordon v. Willis*, 516 F.Supp. 911 at 913 (N.D.Ga. 1980).

The showing Petitioner made here clearly meets this Court's standard, and the denial of the certificate by both the District Court and the Circuit Court therefore raises a serious question, requiring this Court's attention, as to whether the lower courts are in fact applying the *Barefoot* standard to certificates of appealability.

The language of the District Court's order denying the certificate casts additional doubt on that court's claim

of adherence to this Court's *Barefoot* standard. For, after reciting the *Barefoot* standard, the District Court denied the certificate by reference to the order denying the petition itself (Appendix B). This suggests that the District Court, and the Ninth Circuit, in fact make it a practice to deny certificates without requiring any showing beyond that required for denying the petition, thereby effectively depriving petitioners any substantial right to appeal.

Further, Rule of Appellate Procedure 22(b) states that a petitioner who has been denied a certificate of appealability by the District Court, "may then request issuance of a certificate by a circuit judge," and provides that "*[i]f* no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request . . . (emphasis added)." That language clearly offers the petitioner the opportunity to make a new request for a certificate from the judges of the Circuit Court, and implies that circuit judges should decide whether a certificate should issue *sua sponte* only when the petitioner failed to use that opportunity. The record here suggests, however, that Circuit Courts, or at least the Ninth Circuit, make it a practice to decide whether a certificate should issue before the petitioner has had an opportunity to file the request.

Both of these issues raise significant questions as to whether the Ninth Circuit Court of Appeals has "so far departed from the accepted and usual course of judicial proceedings" with regard to certificates of appealability "as to call for an exercise of this Court's supervisory power. . . . " Rule 10(a).

I. Petitioner Was Denied a Certificate of Appealability Despite His Substantial Showing That His Conviction Was Not Supported by Substantial Evidence to Prove Guilt Beyond a Reasonable Doubt.

The decisions of the courts below to deny Petitioner a certificate of appealability strongly suggest that those courts are not following this Court's *Barefoot* standard in deciding whether to issue the certificate.

Thus, the District Court denied the certificate without further discussion on the basis of the reasoning which led that court to deny the petition itself:

> "As set forth in the Report and Recommendation adopted by the Court, petitioner has not presented a colorable claim for federal habeas relief."

Appendix C.

However, a review of the magistrate's report shows that, while it concluded on balance that the California Court of Appeal had reasonably applied this Court's *Jackson* standard (*Jackson v. Virginia*, 443 U.S. 307, 320 [1979]) in deciding that there was sufficient evidence to support Petitioner's conviction, the magistrate did *not* find that conclusion so obvious as to remove it from the realm of issues "debatable among jurists of reason," which "a court *could* resolve . . . in a different manner. . . . " *Barefoot v. Estelle*, 463 U.S. 880 at 893, *supra*.

Thus, the magistrate conceded that the Court of Appeal opinion "gives a minimal analysis of this claim" of insufficient evidence (Report, p. 17). And while he ultimately found the Court of Appeal's application of the

Jackson "reasonable doubt" standard reasonable, he did so only in the most measured terms.

The magistrate first admitted that there was "[n]o direct evidence at trial" to support "the only 'essential element' at issue in petitioner's case . . . a connection between petitioner and the shooter (Report, p. 14)." The question for the magistrate was, therefore, whether the California Court of Appeal reasonably found the purely *circumstantial* evidence of guilt strong enough to support a finding of guilt beyond a reasonable doubt. The magistrate concluded that the Court of Appeal acted reasonably, because the circumstantial evidence was such that "any rational trier of fact could have permissibly drawn the inference that the petitioner orchestrated Anita Green's murder (Report, p. 18)."

That carefully qualified language does *not* warrant the magistrate's later characterization of the report as negating any "colorable" issue of sufficiency of the evidence.

The Ninth Circuit built on this Court's *Jackson* opinion to develop a standard for assessing the sufficiency of circumstantial evidence in *United States v. Bishop*, 959 F.2d 820 at 830 (9th Cir. 1992). The Ninth circuit's treatment of the instant case indicates, however, that it did not adhere to that standard in deciding not to issue a certificate of appealability.

Bishop holds that where there are alternative explanations of the evidence, one pointing to guilt and the other to innocence, the record "must include sufficient probative facts from which a rational factfinder, applying the reasonable doubt standard, could choose the hypothesis

that supports a finding of guilt rather than hypotheses consistent with innocence." *United States v. Bishop*, 959 F.2d 820 at 830 (9th Cir. 1992).

The conditions are present for the application of *Bishop* here: the circumstantial evidence is both equivocal and entirely compatible with innocence. Applying *Bishop*, therefore, the dispositive question is whether there were sufficient additional "probative facts from which a rational factfinder, applying the reasonable doubt standard, could choose the hypothesis that supports a finding of guilt rather than hypotheses consistent with innocence." 959 F.2d at 830.

The answer must be in the negative. There is *no* evidence here which would lead a rational factfinder to choose guilt rather than innocence.

The magistrate focused on (1) evidence of motive, and (2) evidence that Petitioner expressed a desire to see Anita Green dead, in one case suggesting he could "hire a biker to 'blow her brains out' as she was getting out of her car (Report, p. 17)," (3) evidence that Petitioner had verbally and physically abused Anita, and (4) evidence of Petitioner's behavior following the shooting, all to be supportive of guilt (Report, p. 17).

There is, however, a critical problem with all of this circumstantial evidence: *none* of it tends to prove what the magistrate rightly called the "essential element" in making a case against Petitioner: that there was a connection between Petitioner and the shooter. There was *neither* direct *nor* circumstantial evidence of *any* connection, any contact whatever between Petitioner and the person who

actually carried out the crime Petitioner was convicted of committing.

Rather than substantiating Petitioner's participation in a completely hypothetical transaction in which he was supposed to have hired the person who shot his wife, the circumstantial evidence tended only to show that it was *possible* for him to have done so, and to support speculation about how and *why* he might have done so.

Evidence of motive is *not* evidence of a connection between Petitioner and the shooter; nor is the evidence that Petitioner made statements about wanting to see Anita dead. The evidence that Petitioner said in the course of his angry remarks that he could hire a "lowlife" biker to shoot Anita while she was getting out of her car may support speculation that Petitioner actually hired such a person, but is not proof that he did so (RT 1012).

Nor was the evidence of verbal abuse any more probative of the missing "essential element" than was the evidence of motive. Further, the evidence of physical abuse was limited to an accusation Anita made against Petitioner in the course of negotiations to settle their divorce (Report, p. 8), and the fact that the response to the accusation was a proposal from Petitioner's attorney rather than a refutation from Petitioner (RT 1537). Petitioner's decision to defer to his lawyer in that context was hardly proof that he hired his wife's murderer.

Nor was there anything in Petitioner's conduct after the shooting which proved such a connection.

First, there was Petitioner's reaction to finding Anita mortally wounded. The witness Foss saw Petitioner hugging Anita, apparently upset and crying. On the other hand, Detective Coffey testified that a little later Petitioner did not appear upset, and gave him the names of three men he believed to be Anita's lovers as suspects (Report, p. 9). The evidence as to Petitioner's reaction was thus mixed, but entirely consistent with his innocence.

Second, there was Corrado's testimony that Petitioner argued with him over whether and how Petitioner could have known which direction Anita was coming from when she arrived at his office (Report, p. 10). The evidence of this argument was certainly consistent with Petitioner's innocence. There was a good deal of other evidence that Appellant was very argumentative, and might be willing to bend the truth in order to win an argument (RT 780, 966, 976, 1039). Certainly, Petitioner had nothing to gain from engaging in the argument, and it could not possibly be sufficient to prove guilt beyond a reasonable doubt.

The magistrate's conclusion that this circumstantial evidence was sufficient to support a finding of guilt beyond a reasonable doubt is, therefore, eminently *debatable*. The fact is that the case has been a close one from the outset. As the magistrate noted, the jury showed its "uncertainty" by deliberating for seven days (Report, p. 19). Given the questions raised by that "uncertainty," and, crucially, by the absence of *any* evidence, either direct or circumstantial, of contact between Petitioner and the man who shot his wife, it is *at least* "debatable" whether the evidence here meets the *Jackson* standard.

Indeed this case raises a substantial question as to whether under *Jackson* and *Bishop* there can *ever* be sufficient evidence to support a verdict of guilt beyond a reasonable doubt against a person accused of hiring a murderer, where the prosecution has *no evidence whatever* of an actual connection between the defendant and the murderer. Certainly, Petitioner should have a right to appeal that question under this Court's *Barefoot* standard.

The decision of the lower courts on the issue of the sufficiency of the evidence in this case thus strongly indicates that their articulation of the *Barefoot* standard for certificates of appealability was mere lip service, and that they were *not* applying it in practice. This Court should grant the writ and either (a) fully review Circuit Court practice as the issuance of certificates, to ensure that habeas petitioners do in reality have the right to appeal issues which are "debatable," or (b) summarily reverse the denial of the certificate and order that it be issued, on the basis that the Circuit Court here has "so far departed from the accepted and usual course judicial proceedings . . . as to call for an exercise of [this] Court's supervisory power."

II. Petitioner Had a Right to a Certificate of Appealability on the Basis of His Substantial Showing That He Was Denied His Right to Effective Assistance of Counsel.

The issues of whether Petitioner was denied effective assistance of counsel, and whether an evidentiary hearing on ineffectiveness should have been granted, are also

debatable, and the certificate of appealability should have issued as to that issue as well.

The magistrate agreed with Petitioner that " . . . given the jury's uncertainty, any *significant* reinforcement of the defense case would have led to a different result (Report, p. 19)." He concluded, however, that the evidence counsel failed to produce – evidence showing that Petitioner had innocent reasons for wanting Anita to come to his office on the morning of October 25, 1990 – would not have offered any significant reinforcement to the defense case (Report, p. 19).

The question here, therefore is whether it is at least *debatable* that evidence tending to show that Petitioner had an innocent reason for insisting that Anita come to his office that morning would have made a significant contribution to the defense.

It is debatable.

The prosecutor's conduct at trial demonstrates that he thought the point significant. The prosecutor argued on the basis of the evidence as it stood at trial that Petitioner had no good reason to have Anita come to his office that morning except to lure her to her death, and therefore that his insistence on the meeting evidence guilt (RT 1680). The evidence which trial counsel *failed* to present would have allowed the defense to counter that prosecution argument with an innocent explanation of Petitioner's insistence: the need to have Anita complete urgently needed quarterly tax returns due on October 31, 1997 (*see* Memorandum of Points and Authorities in Support of Petition, p. 18).

It is undisputed that there was no evidence directly connecting Petitioner with the shooting. Given that fact, the prosecution's ability to argue unrefuted that the only logical explanation for Petitioner's behavior at the time of the shooting was that he arranged the shooting, was *at the very least* debatably significant to the prosecution case. It follows that the production of evidence which would have *refuted* that argument would also have been *at least* debatably significant to the defense.

Under this Court's *Barefoot* standard, Petitioner should, therefore, have the opportunity to appeal on the issue of ineffective assistance of counsel and the denial of an evidentiary hearing as well. The failure of the District and Circuit courts to issue a certificate of appealability on that issue is further evidence that this Court should grant the writ here and either give the issue a full hearing or summarily reverse.

III. Petitioner Was Denied the Opportunity to Present His Request for a Certificate of Appealability to the Judges of the Circuit Court.

Rule of Appellate Procedure 22(b) states that a Petitioner for writ of habeas corpus who has been denied a certificate of appealability by the District Court, "may then request issuance of a certificate by a circuit judge." The rule goes on to provide that *"[i]f* no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request . . . (emphasis added)."

In this case, Petitioner's counsel intended to file a request for a certificate with the judges of the Circuit Court immediately after the District Court denied the

certificate, but was informed by the clerk's office that a Request should not be sent until the Circuit Court had assigned the case a docket number and issued notice of that number, as the request would likely be lost or misdirected unless it included the Circuit Court's docket number. Asked whether the certificate might be denied in the interim, the clerk responded that it would not (Declaration of Robert S. Gerstein attached to Motion for Reconsideration).

On December 1, 1998, Petitioner's attorney received the first document from the Circuit Court bearing the docket number of the case: the order denying a certificate of appealability. Another call to the clerk's office confirmed that the advice not to file a request without a docket number was not a fluke, but given in accordance with the standard practice of the clerk's office (Declaration of Robert S. Gerstein).

Rule 22(b) reflects a clear intent that Petitioners who have requested and been denied certificates of appealability by the District Court should have the opportunity to present their case anew to the judges of the Circuit Court. The result of the Circuit Court's practice is, therefore, routinely to deny Petitioners the opportunity Rule 22(b) promises them for additional input in the decision of the Circuit Court judges which is directed specifically to those judges.

In this respect too, the Circuit Court has "so far departed from the accepted and usual course judicial proceedings . . . as to call for an exercise of [this] Court's supervisory power." This Court should therefore issue the writ, and either grant full hearing on the issue of

ensuring an opportunity to file a new request in accordance with Rule 22(b) or, in the alternative, summarily reverse the refusal to grant the certificate, and direct that it be granted, or at least that Petitioner be given an opportunity to file a new request before the Circuit Judges decide again whether it should be granted.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that the writ be granted, and either that this Court grant full hearing of the issues raised above, or, in the alternative that the Circuit Court judges' denial of the certificate of appealability be reversed summarily, with instructions either to issue the certificate or, at least, to allow Petitioner the opportunity to file a request for the certificate before a decision is made whether to issue it or not.

Dated: May 14, 1999

Respectfully submitted,

ROBERT S. GERSTEIN
Attorney for Petitioner,
Melvin Morton Green

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MELVIN MORTON GREEN, Petitioner, v. ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, et al., Respondents.	No. 98-56665 DC# CV-97-7045-CAS Central California ORDER (Filed Nov. 27, 1998)

Before: BRUNETTI and SILVERMAN, Circuit Judges

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2).

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA-
WESTERN DIVISION

MELVIN MORTON GREEN Petitioner, v. CAL TERHUNE, Director of Corrections, et al., Respondents.	CV 97-7045-JMI (SH) ORDER ADOPTING REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (Filed Aug. 31, 1998)

Pursuant to 28 U.S.C. Section 636(b)(1)(C), the Court has reviewed the Petition, all of the records and files herein and the attached Report and Recommendation of the United States Magistrate Judge, and has made a *de novo* determination of the Report and Recommendation. The Court concurs with and adopts the conclusions of the Magistrate Judge.

IT IS ORDERED that petitioner's request for an evidentiary hearing is denied; and the Petition filed herein is dismissed with prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate Judge's Report and Recommendation and the Judgment herein by the United States mail on petitioner and counsel for respondent.

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: 8/31/98

/s/ James M. Ideman
JAMES M. IDEMAN
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA-
WESTERN DIVISION

MELVIN MORTON GREEN, Petitioner, v. CAL TERHUNE, Director of Corrections, et al., Respondents.	CV 97-7045 JMI (SH) REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE (Filed Jul. 16, 1998)

This Report and Recommendation is submitted to United States District Judge James M. Ideman, pursuant to 28 U.S.C. § 636 and General Order 194 of the United States District Court for the Central District of California. For the reasons discussed below, the Magistrate Judge recommends that the Petition be dismissed with prejudice.

I. PROCEDURAL HISTORY

On May 24, 1991, petitioner was charged with murder, in violation of Penal Code section 187(a). (Information, Clerk's Transcript ["CT"] at 172.) Special circumstances were alleged, namely that the murder was intentional and carried out by petitioner for financial gain, within the meaning of Penal Code section 190.2(A)(1), and that a principal was armed with a firearm in the commission of the offense, in violation of Penal Code section 12022(a)(1). (CT at 173.)

Petitioner was tried before a jury in Los Angeles Superior Court (No. PA006296). On March 4, 1992, the jury found him guilty, as charged, of first degree murder. (CT at 330.) The jury found *true* the allegations that the murder was intentional and carried out by petitioner for financial gain, and that a principal in said offense was armed with a firearm. (*Id.*)

On May 27, 1992, petitioner was sentenced to life imprisonment without parole. (Minute Order, CT at 382.).

Petitioner appealed to the California Court of Appeal (No. B068143). On December 14, 1993, the Court of Appeal affirmed the conviction in an unpublished Opinion. ("Opin." at Supplemental Return ["Supp. Ret."] Exhibit ["Ex."] A.)

Petitioner then filed a Petition for Review. (*See* Return ["Ret."] at 4.) On March 17, 1994, the California Supreme Court denied review. (*Id.; see also* Petition ["Pet."] at 5.) On April 22, 1997, petitioner filed a petition for writ of habeas corpus in the Los Angeles Superior Court. The petition was denied on June 25, 1997. (Minute Order, April 2, 1998 at 2.) Petitioner then filed a new petition for writ of habeas corpus with the California Court of Appeal, which was denied on July 23, 1997. (*Id.*) Petitioner then filed a Petition for Review, which the California Supreme Court denied on September 17, 1997. (*Id.*)

On September 22, 1997, petitioner, represented by counsel, filed the instant Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. Respondent filed a Return on January 16, 1998. Petitioner filed his Traverse and supporting Points and Authorities on March 18, 1998.

Respondent filed a Supplemental Return on May 11, 1998, to which petitioner filed his Supplemental Traverse on June 30, 1998.

II. THE CASE PRESENTED AT TRIAL

A. THE SHOOTING

Anita Green was shot while in the driver's seat of a red Corvette in the parking lot of petitioner's business in the vicinity of Oxnard and Wilkinson in North Hollywood on the morning of October 25, 1990, and died from a single gunshot wound to the head. (Reporter's Transcript ("RT") at 648-49, 695.)

On that morning, Nicholas Foss was working on a roof across the street from petitioner's business on Wilkinson Street. (RT at 725-26.) At some time that morning, Foss heard a loud pop and looked up from his work. (RT at 727.) He observed a man standing at the open door of a red Corvette, wearing a green army jacket and a black motorcycle helmet with dark glass in front. (RT at 727-30.) The man quickly ran away from the Corvette, mounted his motorcycle, and drove away. (RT at 731-32.) The man proceeded north up Wilkinson. (RT at 732.)

Foss proceeded down to the parking lot and approached the Corvette. (RT at 734.) Upon seeing a woman bleeding in the driver's seat, Foss called 911 from the house where he was working. (*Id.*) Detective John Coffey, North Hollywood Division Homicide Detail, Los Angeles Police Department, arrived on the scene within four to five minutes of the emergency call. (RT at 665.) Petitioner was at the scene when Detective Coffey arrived. (*Id.*)

Robert Riley was driving a concrete mixing truck for the Department of Water and Power on October 25, 1990. (RT at 751.) At approximately 10:30 or 10:45 a.m., he was proceeding down Irwin Street, near Wilkinson Street, when he observed a motorcycle rider approaching him on the wrong side of the road. (RT at 753-54.) The rider's helmet hung from the handle bar of the motorcycle. (RT at 756-57, 759.) The motorcycle was proceeding westbound, coming from the direction of Wilkinson. (RT at 754-55.) Riley slammed on his brakes, and the motorcyclist, apparently noticing the truck for the first time after having been looking in another direction, lost control of the motorcycle and fell over. (RT at 756.) The rider got up again and rode away on the motorcycle. (*Id.*) Riley indicated at trial that the motorcycle he saw was of the same type as pictured in People's Exhibit 8 (RT at 755), a motorcycle that Foss indicated resembled the motorcycle he had seen at the scene of the homicide. (RT at 732.)

Several credit cards and $89.57 in cash were found in the victim's purse. (RT at 658.) No bullet was ever recovered from the scene of the homicide (RT at 663-64), and the shooter was never identified nor apprehended. (RT at 761-68.)

B. EVIDENCE LINKING PETITIONER TO THE SHOOTING

1. Petitioner's Abusive Relationship With the Victim

Petitioner and the victim were married in 1981. (RT at 777.) Scott Arnow, the victim's son, lived with his mother and stepfather (petitioner) for several years after the two

wed. (*Id.*) Arnow testified at trial that after approximately five years, animosity began to develop between Mr. and Mrs. Green. (RT at 778, 782-83.) Mr. and Mrs. Green quarreled two to three times per week. (RT at 780.) Petitioner initiated the arguments, screaming and referring to Mrs. Green by derogatory and insulting names. (RT at 780-81.) During the last year that Arnow lived at home, the level of animosity between petitioner and the victim intensified. (RT at 783-84.)

Barbara Wolpow, a former employee of petitioner's, testified that petitioner "tried to control [Mrs. Green, then Anita Arnow,] in every possible way" while she worked at petitioner's office. (RT at 854-55.) According to Wolpow, petitioner would storm into the victim's office and begin yelling at her, seize the telephone receiver from the victim's hand and hang upon while the victim was in the midst of a call, and occasionally refuse to let her leave. (RT at 824-27.) Petitioner attempted to control the times at which the victim left the office to take care of certain tasks, such as taking her son to the doctor. (RT at 827.) Although petitioner "yelled and screamed" at other employees, he was "more vicious" towards the victim than towards any other employee. (RT at 854.)

Gilbert Mershon, who was acquainted with petitioner and the victim, testified that petitioner was "unbelievably abusive" toward, and "sharply critical" of, the victim. (RT at 1007-08.) According to Mershon, petitioner would "brow beat" her, insult her in public, and publicly accuse her of infidelity. (RT at 1008-09.)

2. Petitioner's Statements

During a conversation that petitioner had with Mershon concerning petitioner's [then] potential divorce, Mershon explained to petitioner that if Mrs. Green sued the petitioner for divorce, then his abuse of his wife might cost him a great deal in connection with the property settlement. (RT at 1010.) Petitioner responded that if his wife "tried to get anything of his any more than what he wanted to give her, he would kill her and he told her the same." (*Id.*) In a subsequent conversation, Mershon told petitioner that petitioner's threats would make getting away with the actual killing impossible. (RT at 1011-12.) Petitioner replied that he would "just hire somebody and someday she'll be getting out of her car and somebody will walk up and blow her brains out." (RT at 1012.) When Mershon asked how petitioner would find someone to perform such a task, petitioner responded, "It's easy, people that you can hire. It's easy." (*Id.*) In a late conversation, petitioner indicated that he could "go out to the desert and . . . hire a biker . . . or get some lowlife and they'll do it." (RT at 1013.)

Late in 1989, Mershon told his mother, Rose Marie Mershon, that petitioner had told him that he would have his wife killed if she divorced him. (RT at 1084, 1103.) In April or May of 1990, Mershon told his mother that petitioner had said that "someday, Anita would be getting out of her car and someone would drive up and blow her head off." (RT at 1104.) Mrs. Mershon remembered the conversation vividly. At the time, she told her son that he should call Anita and warn her. (*Id.*) Mershon subsequently warned the victim about petitioner's statements. (RT at 1013, 1015.)

Between 1982 and 1987, Angela Ramos was the Greens' maid. (RT at 1113.) Ramos witnessed many verbal altercations between petitioner and the victim, and heard petitioner tell his wife that she might be able to leave him, but she would not "be able to spend his money." (RT at 1113-15.) On one occasion, she heard petitioner tell his wife that "she could go away but she won't [sic] live to see the money." (RT at 1117.)

Amanda Truett worked as an agent for the Internal Revenue Service and began conducting an audit involving petitioner in July of 1988. (RT at 1147-48.) The focus of the audit was a client of petitioner's, not petitioner's entire business. (RT at 1149.) During the latter half of the investigation, petitioner would communicate regularly with Truett by telephone and letter. (RT at 1165.) By the summer of 1990, petitioner would call Truett three to five times per week. (RT at 1165-66.) During Truett's last phone conversation with petitioner, in mid-September of 1990, petitioner started the conversation by saying, "Anita is sleeping with the Rabbi." (RT at 1169.) Petitioner also told Truett that his wife and Mershon were in a conspiracy to take over his business, and that he believed that his wife was removing important documents from his files in order to disrupt the audit. (RT at 1167-68.) Petitioner told Truett, "Anita had better be careful about every time she picked up a glass of wine . . . every time she walked under a chandelier," (RT at 1169.) At the conclusion of this telephone conversation, petitioner said in reference to the victim, "I am so angry I could kill her." (RT at 1174.)

Phyllis Baltin had known the victim for twenty years at the time of her death and had been acquainted with

petitioner for nine years. (RT at 1205.) On July 12, 1990, at approximately 5:30 p.m., Baltin was having dinner at home with William Shiffbauer. (RT at 1207.) She received a telephone call from petitioner, who wished to speak with Shiffbauer. (RT at 1208.) Baltin was able to hear both sides of their conversation. (RT at 1209, 1214-15.) Petitioner asked Shiffbauer "how much it would cost . . . to have Anita taken care of and [Shiffbauer] said five million dollars." (RT at 1209-10.) Petitioner then asked Shiffbauer, who was married, if he would eventually be leaving his wife, and if he would be "interested in having his wife knocked off in return for Anita." (RT at 1209.) After Shiffbauer finished speaking with petitioner, he handed the phone back to Baltin, who asked petitioner whether she had in fact heard what she thought she heard, to which petitioner replied affirmatively. (RT at 1210.) Although Baltin did not consider petitioner to be a close friend or confidant, petitioner did confide in her on different occasions. (RT at 1218.)

Shiffbauer, also testifying about the same telephone conversation, stated that he was shocked by petitioner's inquiry as to how much it would cost to "knock off" Mrs. Green. (RT at 1222-23.) With respect to petitioner's inquiry and his alternative suggestion of having Shiffbauer's wife "taken car of" in return for Shiffbauer "knocking off" petitioner's wife, Shiffbauer testified that petitioner was "very serious" and did not appear to be joking. (RT at 1229.)

3. Evidence of Petitioner's Motive

Petitioner suspected that Anita Green was providing damaging information to the IRS regarding his business. (RT at 972-73, 975, 995.) Barbara Wolpow testified that a business practice of petitioner's involved having his clients sign blank pieces of paper and then inserting various information for use in conjunction with the clients' tax returns. (RT at 828-30.) Initially, Anita Green worked as a bookkeeper, working on, collating, and finalizing tax returns to send out to the office. (RT at 836-37.) Later, she became office manager. (RT at 837, 965.) On one of many occasions, petitioner stated that the victim was trying to damage his business, destroy him, and drive off his clients, and said that the victim was "threatening him relative to the IRS." (RT at 971-72.)

On August 14, 1990, after returning from the IRS building in Van Nuys, petitioner indicated that he had seen his wife's car in the parking lot of the IRS building, and stated that any further problems she caused him with respect to the IRS would "ultimately be on her head." (RT at 972, 975.) The victim indicated to her attorney that she had the ability to harm petitioner by contacting the IRS. (RT at 882.) The victim also indicated to two people during the summer and early fall of 1990 that she had certain information she could divulge to the IRS that would seriously hurt her husband and damage his business. (RT at 985-86, 994-95.)

Gilbert Mershon testified that petitioner indicated that he would kill his wife if she sought any more from the divorce "than what [petitioner] wanted to give her."

(RT at 1010.) At the time of the victim's death, the difference between their offers of settlement was $300,000. (RT at 863-64.) During petitioner's last phone conversation with Amanda Truett, petitioner told Truett that his wife wanted too much money in the divorce settlement. (RT at 1167.)

On September 6, 1990, petitioner and the victim met, represented by their respective attorneys. (RT at 873-74, 1531-32.) During the meeting, petitioner accused the victim of talking to the IRS concerning his business. (RT at 874-75.) At the conclusion of the meeting, Mrs. Green's attorney suggested that the victim should work at petitioner's office in exchange for certain funds during the pendency of the divorce. (RT at 876.) Mrs. Green did not receive this suggestion favorably, explaining that she was afraid of petitioner because he had firearms in the office and at home, had threatened her, and had waved guns at her. (RT at 877-78.) She also stated that petitioner had been physically violent with her until very recently. (RT at 878-79.) Petitioner remained silent throughout the victim's accusations. (RT at 876-79.) Petitioner and Mrs. Green then agreed that Mrs. Green was to go to petitioner's office, pick up work, take it home, and bring the completed work back to the office, rather than working there as a regular employee. (RT at 879-80.) According to her attorney, Mrs. Green received no more than a few hundred dollars for this work. (RT at 956.)

On October 24, 1990, the day before the murder, the victim was at Eugenia Siguneza's beauty salon, when she received a call between 2:00 and 3:00 p.m. from petitioner. (RT at 1280.) On two prior occasions, the victim had received phone calls at Siguneza's beauty salon from

petitioner. (RT at 1277-80.) All phone calls concerned a check that petitioner insisted the victim pick up from petitioner's office. (*Id.*) Over a three-week period, the victim repeatedly requested that the petitioner mail her the check. (*Id.*) During the October 24 phone call, petitioner insisted that the victim come to his office the next day at 10:30 a.m. to pick up the check. (RT at 1280-83.) After the conclusion of this phone call, Mrs. Green told Siguneza that she could not be at petitioner's office at 10:30 the next morning because she had other business, but that she would have to go if she wanted the check because she needed the money. (RT at 1285.) She also stated that she was afraid to pick up the check. (RT at 1285-86.) Petitioner had written down the October 25, 1990, 10:30 a.m. appointment with Mrs. Green in his appointment book. (RT at 968.)

4. Evidence of Petitioner's Behavior Surrounding the Shooting

Immediately prior to the shooting, petitioner had been standing near the reception window of his office for a "couple of minutes." (RT at 1313-15.) As elaborated on in closing arguments, the window at which he was standing looked out onto Oxnard Street (RT at 1681-82.), a street on which the victim was likely to have traveled on her way to petitioner's office on the day of her murder. (RT at 1294-95.)

Before emergency medical personnel arrived, Nicholas Foss saw the petitioner hug the victim for approximately one or two minutes and heard the petitioner say, "Oh my God, Oh my God," and "It's my wife."

(RT at 744-46, 749-50.) According to Foss, petitioner did not appear calm at the time but seemed upset and was crying. (RT at 746.)

Upon Detective Coffey's arrival on the scene, Coffey asked petitioner what was going on, to which petitioner replied, "Why don't you check into the guys that she's screwing?" (RT at 665.) Petitioner then gave Coffey the names of three individuals with whom the victim was allegedly having sexual relations. (*Id.*) According to Detective Coffey, petitioner did not appear to be upset at the time and seemed very precise in his statements. (RT at 665-66.)

Later on the day of the murder, petitioner spoke with Joseph Corrado, with whom petitioner shared a residence. (RT at 1334.) Petitioner stated that the victim "probably cut this guy off on the freeway, and she was coming west, westbound on Oxnard and made a right turn on Wilkinson." (RT at 1322, 1334-35.) Corrado stated that he lived in Sherman Oaks and usually came eastbound on Oxnard to make a left turn on Wilkinson. (RT at 1322.) Petitioner argued with Corrado, insisting "that she definitely made a right turn. . . . " (*Id.*) Petitioner was "trying to pretty forcefully . . . convince [Corrado] that [Mrs. Green] was coming from the freeway," and was banging on the table while trying to prove this point. (RT at 1323.) When Corrado asked petitioner how he knew this, petitioner said that he heard it from the roofer, Nicholas Foss. (RT at 1323, 1338.)

The victim spent the night before the murder with Rabbi Steven Jacobs, staying overnight at his home. (RT at 1293.) Jacobs indicated at trial that the victim had told

him that she had to be at petitioner's office the next morning to pick up a check. (RT at 1310.) Jacobs testified that there were two routes to take from his home to petitioner's office: one involved taking the 405 freeway, exiting at Burbank, traveling east and eventually traveling west on Oxnard; the other involved exiting the Hollywood freeway at Oxnard and proceeding west. (RT at 1294-95.)

On the day following the murder, petitioner approached Nicholas Foss, initiating a conversation about the shooting. (RT at 736.) Uncertain of with whom to speak, Foss said only that he observed a motorcycle in connection with the incident. (*Id.*) Petitioner asked about Foss's identity and residence, but Foss declined to provide that information to petitioner. (RT at 737.) Foss never indicated to petitioner, nor to anyone else, the direction from which the motorcycle or the Corvette had approached the scene of the shooting. (*Id.*) Foss did not know either of these facts. (*Id.*)

C. PETITIONER'S DEFENSE

The defense offered testimony from the attorney who represented petitioner in divorce proceedings that the victim could not have obtained more money from a divorce settlement than had been previously agreed upon in prenuptial agreements. (RT at 1528-33.) Petitioner's main strategy in his defense consisted of emphasizing the weakness of the prosecution's case: attempting to discredit the prosecution's witnesses and establish lack of a motive. Without petitioner's own testimony, the main thrust of petitioner's defense, at trial and subsequently,

was that the evidence was insufficient to connect him with the shooter.

III. PETITIONER'S CLAIMS

The Petition raises two Constitutional claims as grounds for habeas relief:

(1) Petitioner's conviction on insufficient evidence violated due process of law;

(2) Ineffective assistance of trial counsel.

The Magistrate Judge found on April 2, 1998 that petitioner had exhausted state court remedies on these claims, as required under 28 U.S.C. § 2254(b). (Minute Order, April 2, 1998, at 3.)

IV. STANDARD OF REVIEW

This Court is limited to deciding whether petitioner's convictions violated the United States Constitution. 28 U.S.C. §§ 2241(c)(3), 2254(a). Federal habeas relief is not available for a state court's alleged error in interpreting or applying state law. *Estelle v. McGuire*, 502 U.S. 62, 67-68, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991).

This Court may not grant relief on any claim which was adjudicated on the merits in a state court proceeding, unless that adjudication resulted in either (1) "a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" or (2) "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the

State court proceeding." 28 U.S.C. § 2254(d). This Court must presume correct any state court factual determination not rebutted by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

V. DISCUSSION

For the reasons discussed below, the Magistrate Judge finds that petitioner is not entitled to habeas relief on his claim of insufficient evidence, nor on his claim of ineffective assistance of counsel.

A. THE CLAIM OF INSUFFICIENT EVIDENCE

Petitioner claims that the evidence at trial was constitutionally insufficient to support his murder conviction. The Due Process Clause of the Fourteenth Amendment protects a criminal defendant against conviction, "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) (quoting *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). A petitioner challenging a state conviction as a due process violation is entitled to federal habeas relief "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson*, 443 U.S. at 324.

Before directly deciding petitioner's claim of insufficient evidence, this Court must first determine whether it is required to defer, under 28 U.S.C. § 2254(d), to any California court that has already decided this claim, on its

merits, in a decision which was neither (1) "contrary to," nor "an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States;" nor (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

On claims of insufficient evidence, the *Jackson* decision itself contains "clearly established Federal law, as determined by the Supreme Court of the United States," for purposes of review under 28 U.S.C. § 2254(d)(1). *See Mitchell v. Prunty*, 107 F.3d 1337, 1339-40, n.3 (9th Cir. 1997), *cert. denied*, 66 U.S.L.W. 3281 (1997) ("Here the relevant federal law is clearly established; sufficiency of the evidence is evaluated under the standard set forth in *Jackson v. Virginia*"); *Gomex v. Acevedo*, 106 F.3d 192, 197-99 and n.5 (7th Cir. 1997), *vacated on other grounds*, 118 S. Ct. 37 (1997) (*Jackson* standard applies in federal habeas review of state trials, in state appellate review, and in federal appellate review of federal trials or federal habeas proceedings).

Therefore, this Court must determine, *inter alia*, whether any California court has already decided this claim in a decision which was neither "contrary to" nor "an unreasonable application of" the *Jackson* standard.

1. The Jackson Standard

In *Jackson*, The Supreme Court stated, in several formulations, the standard for federal habeas review of a claim that a state defendant was convicted on insufficient evidence. The formula most often cited is the following:

> "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."

443 U.S. at 319 (emphasis in original); *see also Wright v. West*, 505 U.S. 277, 284, 112 S. Ct. 2482, 120 L. Ed. 2d 225 (1992).

The *Jackson* standard does not require affirmatively ruling out every hypothesis except that of guilt. *Wright*, 505 U.S. at 296 (quoting *Jackson*, 443 U.S. at 326). *Jackson* does not require the reviewing court to decide whether *it* would have found the trial evidence sufficient. 443 U.S. at 318-19. Nor does *Jackson* require the reviewing court to scrutinize "the reasoning process actually used by the factfinder." *Id.* at 319-20 n.13.

Instead, as discussed in detail in *Jackson*, a federal habeas court must review all the evidence actually presented at trial, consider that evidence in the light most favorable to the prosecution, and determine whether, based on that evidence, considered in that light, any rational trier of fact could have found the essential elements of the crime charged, beyond a reasonable doubt. *Id.* at 319 et seq.

In federal habeas review of a state conviction, the essential elements of the crime are defined by state law, and the *Jackson* standard "must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law." *Id.* at 324 n.16. The only "essential element" at issue in petitioner's case is the connection between petitioner and the person on the

motorcycle who shot Anita Green on October 25, 1990. Petitioner's conviction depended on the jury having established this connection.

No direct evidence at trial established a connection between petitioner and the shooter. This relationship was, necessarily, based on inferences drawn from circumstantial evidence. The question here, on *Jackson* review, is whether there were any inferences, supported by this circumstantial evidence, that provided a sufficient basis for a rational jury to find, beyond a reasonable doubt, that petitioner hired the shooter to kill his wife.

2. The Jackson Standard and Circumstantial Evidence

Under Federal or California law, elements of a crime (including murder) may be established by circumstantial evidence and inferences drawn from it. *United States v. Free*, 841 F.2d 321, 325 (9th Cir.), *cert. denied*, 486 U.S. 1046 (1988), citing *United States v. Thomas*, 453 F.2d 141, 143 (9th Cir. 1971) (per curiam), *cert. denied*, 405 U.S. 1069 (1972) (inferences from facts established by circumstantial evidence may be sufficient to sustain verdict of guilt); *cf. People v. Thomas*, 2 Cal. 4th 489, 514, 828 P.2d 101, 7 Cal. Rptr. 2d 199 (1992), *cert. denied*, 506 U.S. 1063 (1993) ("Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt" [if] "the circumstances reasonably justify the trier of fact's findings."). On the other hand, "mere suspicion or speculation cannot be the basis for the creation of logical inference." *Free, id.*, citing *Thomas, id.*

When the "record of historical facts" in the state trial "supports conflicting inferences," the role of the federal habeas court is neither to determine which inference the jury actually drew, nor to decide for itself which of the permissible inferences the jury should have drawn. *Jackson*, 443 U.S. at 326. On the contrary, in applying the *Jackson* standard to evidence that supports conflicting inferences, the reviewing court "must presume . . . that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Id.*

This presumption is a specific application of the rule that the reviewing court must consider all the evidence in the light most favorable to the prosecution. *Id.* At 319, *cf.* 326. That includes viewing in that light any inferences reasonably supported by the evidence. When the record facts reasonably support several conflicting inferences, the reviewing court does not decide which, among several conflicting inferences, is the more reasonable. Instead, that court must presume that the hypothetical "any rational factfinder" made the reasonable inference most favorable to the prosecution, and must defer to that resolution of the conflict, by accepting that inference as part of the evidence considered in deciding whether the evidence, as a whole, was sufficient for conviction.

On the other hand, *Jackson* does not require the reviewing court to defer to *any* inference that a jury *might* have drawn, so long as the inference is favorable to the prosecution. Indeed, such deference would effectively bar any *Jackson* challenge to a conviction that depended on an inference. The challenged conviction itself, in which a real jury actually drew an inference favorable to the prosecution, would suffice to establish that a hypothetical

jury could have done so. Furthermore, an inference, favorable to the prosecution, might be drawn irrationally, unreasonably, and based on a "mere modicum" of evidence. *Jackson*, 443 U.S. at 320. Requiring deference to such an inference would effectively reduce the *Jackson* standard (requiring evidence sufficient beyond a reasonable doubt) to a preponderance, or even a "some evidence" standard, whenever a verdict depended on an inference.

However, the *Jackson* Court held that due process requires evidence that could "*rationally* support a conviction beyond a *reasonable* doubt," rather than requiring simply *some* relevant evidence of guilt, even a "mere modicum." 443 U.S. at 320 (emphasis added). Accordingly, *Jackson* requires that the reviewing court defer to a "reasonable" inference drawn by a "rational" juror. Therefore, when a jury could only find an essential element through an inference from circumstantial evidence, the reviewing court does not simply accept any *possible* inference favoring the prosecution, and decide whether the inferred facts are legally sufficient to establish the element in question. The court must *also* determine whether it would be "rational" for a jury to draw that inference – that is, whether, in the context of all the record evidence, that inference is a reasonable one, with sufficient evidentiary support.

3. The Court of Appeal's Opinion and the Jackson Standard

Without comment, the California Supreme Court denied petitioner's second Petition for Review that raised

the two issues that petitioner raises in the instant Petition for Writ of Habeas Corpus. A federal habeas court must determine for itself the basis for such a "silent" denial. *See Hunter v. Aispuro*, 982 F.2d 344, 347-48 (9th Cir. 1992), *cert. denied*, 510 U.S. 887 (1993). "Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Ylst v. Nunnemaker*, 501 U.S. 797, 803, 111 S. Ct. 2590, 115 L. Ed. 2d 706 (1991). Here, this Court must apply the *Ylst* presumption, and "look through" the California Supreme Court's silent denial, to the only prior adjudication of this claim, on its merits, in the record: the California Court of Appeal's Opinion rejecting the claim.

The prosecution bore the burden of proving, beyond a reasonable doubt, that petitioner was responsible for the murder of Anita Green. Petitioner's defense was that he was not connected to the shooter, and that the evidence was not sufficient to prove that he was. For the reasons discussed below, the Magistrate Judge finds, after reviewing the Court of Appeal's Opinion and the trial record, that the Court of Appeal's decision was neither "contrary to" nor "an unreasonable application of" the *Jackson* standard to the facts in petitioner's case, and merits deference under § 2254(d).

Although the Opinion gives a minimal analysis of this claim, i.e., stating a conclusion, listing facts, and repeating the conclusion, the conclusion is a reasonable application of *Jackson*. Viewed in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

As stated above, petitioner had a motive – perhaps several – to have Anita Green killed. First, she possessed damaging information about petitioner's business practices. A rational juror could have concluded that the petitioner believed that such information could have resulted in petitioner losing his business. Second, she was challenging the validity of the prenuptial agreements, demanding $300,000 more than petitioner was willing to give her. Third, she was romantically involved with at least one person.

Petitioner made known to three individuals his desire to see Anita Green dead. The petitioner expressed this desire five times, each on a separate occasion, to these three individuals. Moreover, petitioner indicated to one individual that he would hire a biker to "blow her brains out" as she would be getting out of her car. A rational trier of fact could have concluded that the actual manner of her death was not merely coincidental. Petitioner himself even told the victim that she could leave him but that she would not live to see the money.

In addition to petitioner's verbal and physical abuse of the victim and his behavior following the shooting, all the evidence taken together could lead any rational trier of fact to conclude beyond a reasonable doubt that the petitioner aided and abetted the principal in the murder of Anita Green. Rather than being consistent with innocence, as the petitioner contends (Supp. Trav. at 4-7.), these facts amount to circumstantial evidence, from which any rational trier of fact could have permissibly drawn the inference that the petitioner orchestrated Anita Green's murder. Thus, the conclusion of the California Court of Appeal merits deference under § 2254(d).

B. THE CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL

Petitioner contends that he received ineffective assistance of counsel at trial. In analyzing whether petitioner's counsel was constitutionally ineffective, the court considers two issues: first, whether counsel's performance was deficient, falling below an objective standard of reasonableness viewed from the time of representation; and second, whether that deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984). Petitioner bears the burden of satisfying both these elements. *Id.* In proving prejudice, the petitioner must demonstrate a reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694. Review of counsel's performance is "highly deferential" and there is a "strong presumption" that counsel rendered adequate assistance and exercised reasonable professional judgment. *United States v. Ferreira-Alameda*, 815 F.2d 1251, 1253 (9th Cir. 1987); *see also Strickland*, 466 U.S. at 697.

Petitioner asserts that he received ineffective assistance of counsel when trial counsel did not present evidence to contradict the prosecution's contention that petitioner insisted that the victim come to his office at 10:30 a.m. on October 25, 1990 to pick up a check. Petitioner claims that the victim came to his office that morning to do some work, rather than pick up a check. Petitioner further claims that his trial counsel failed to adequately emphasize the original statement that Rabbi

Jacobs made to the police, in which Jacobs stated that Mrs. Green went to petitioner's office on October 25, 1990, to do some work. Petitioner contends that had trial counsel pursued this line of argument, the only arguable link between petitioner and the murder would have been "destroyed" by establishing that he had a perfectly innocent motive for insisting that Anita come to his office on the morning of October 25, 1990.

In not pursuing this argument, petitioner's trial counsel did not fall below an objective standard of reasonableness. Instead, trial counsel most likely recognized the futility in such an argument, thus exhibiting tactical competence. The avowed reason behind petitioner's insistence that the victim be at his office precisely at 10:30 a.m. on October 25, 1990, is innocuous. Whether petitioner insisted that she be at his office at that time on that day to pick up a check or to do some work, or both, was not crucial. Perhaps it is reasonably probable that, given the jury's uncertainty,[1] any *significant* reinforcement of the defense case would have led to a different result. However the cited "reinforcement" evidence was *insignificant*. Thus, even if trial counsel's performance fell below an objective standard of reasonableness in not pursuing this argument, the outcome of petitioner's trial would not have been different. The weight of the totality of the evidence convicted petitioner, not counsel's decision to forego a futile argument.

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[1] The jury deliberated for seven days, requesting guidance on the fifth day after not being able to come to a unanimous decision. On the seventh day, they were able to reach a verdict.

C. PETITIONER'S REQUEST FOR AN EVIDENTIARY HEARING

Petitioner contends that an evidentiary hearing should be held to determine whether he received ineffective assistance of counsel at trial. A habeas petitioner is entitled to an evidentiary hearing if: (1) his allegations, "if proved, would entitle him to relief; and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts." *Hendricks v. Vasquez*, 974 F.2d 1099, 1103 (9th Cir. 1992). An evidentiary hearing is not required on issues that can be resolved by reference to the state court record. *Totten v. Merkle*, 137 F.3d 1404, 1413 (9th Cir. 1998) (citing *Campbell v. Wood*, 18 F.3d 662, 679 (9th Cir. 1994)).

Petitioner cannot satisfy the first requirement for an evidentiary hearing. Even if petitioner's allegations of ineffective assistance were true, the veracity of such allegations would not warrant relief. Petitioner has failed to show prejudice resulting from the alleged ineffective assistance. As noted above, whatever petitioner's reason for insisting that Mrs. Green be at his business at 10:30 a.m. on October 25, 1990, petitioner was not prejudiced. The significance of the appointment with Mrs. Green lay not in the reason for her visit, but in petitioner's insistence that she be there at a precise time on a precise day.

VI. RECOMMENDATION

For all of the foregoing reasons, it is recommended that the Court issue an order: (1) approving and adopting

this Report and Recommendation; (2) denying petitioner's request for an evidentiary hearing; and (3) directing that Judgment be entered dismissing the Petition with prejudice.

DATED: 7/16/98

/s/ Stephen J. Hillman
STEPHEN J. HILLMAN
UNITED STATES
MAGISTRATE JUDGE

APPENDIX C

I HEREBY CERTIFY THAT THIS DOCUMENT WAS SERVED BY FIRST CLASS MAIL, POSTAGE PREPAID, TO ALL COUNSEL (OR PARTIES) AT THEIR RESPECTIVE MOST RECENT ADDRESS OF RECORD IN THIS ACTION ON THIS DATE.

DATED: 10-5-98

/s/ Sandra Butler
DEPUTY CLERK

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA-
WESTERN DIVISION

MELVIN MORTON GREEN, Petitioner, v. CAL TERHUNE, DIRECTOR, Dept. Of CORRECTIONS Respondent.	CV 97-7045-CAS (SH) ORDER DENYING CERTIFICATE OF APPEAL ABILITY (Filed Oct. 2, 1998)

On September 29, 1998, petitioner filed a Notice of Appeal and a Request for Certificate of Appealability.

A Certificate of Appealability is to be granted only if the petitioner makes a "substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2), as amended by Title I; § 102, Antiterrorism and Effective Death Penalty Act of 1996, (Pub.L.No. 104-132, 110 Stat.

1214; *See Barefoot v. Estelle*, 463 U.S. 880, 893, 77 L.Ed.2d 1090 1983). To make a substantial showing, the petitioner must demonstrate that the issues are "debatable among jurists of reason", and that a court could resolve the issues differently. Alternatively, the petitioner must show that the issues are "adequate to deserve encouragement to proceed further." *Clark v. Lewis*, 1 F.3d 814, 819 (9th Cir. 1993), citing *Barefoot v. Estelle, supra* 463 U.S. at 893 n. 4. *See also*, 28 U.S.C. § 2253.

As set forth in the Report and Recommendation adopted by the Court, petitioner has not presented a colorable claim for federal habeas corpus relief. Accordingly, petitioner has not made a substantial showing that he has been denied a constitutional right.

ORDER

Therefore, pursuant to 28 U.S.C. § 2253, the Court DENIES the Petition for Issuance of Certificate of Appealability.

DATED: October 2, 1998

/s/ Christina A. Snyder
CHRISTINA A. SNYDER
UNITED STATES
DISTRICT JUDGE

PRESENTED BY:
Dated: Oct. 1, 1998

/s/ Stephen J. Hillman
STEPHEN J. HILLMAN
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MELVIN MORTON GREEN, Petitioner, v. ATTORNEY GENERAL OF THE STATE OF CALIFORNIA, et al., Respondents.	No. 98-56665 DC# CV-97-7045-CAS Central California ORDER (Filed Feb. 16, 1999)

Before: BRUNETTI and SILVERMAN, Circuit Judges

Petitioner's motion for reconsideration of the court's November 27, 1998 order is denied, and the suggestion for rehearing en banc is rejected. *See* Gen. Ord. 6.11 (panel may reject suggestion on behalf of court).